IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
JAN 3 1975
MICHAEL RODAK, JR., CLERK

No. 74-521

ROGERS C.B. MORTON,
SECRETARY OF THE INTERIOR,
Petitioner,

v.

DELTA MINING, INC.,
G.M.W. COAL COMPANY,
EDWARD MEARS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The present case is one of two cases now pending before the Court on petitions for certiorari to obtain review of Court of Appeals decisions involving penalty assessment functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act.

The other pending case, *National Independent Coal Operator's Association v. Morton*, No. 73-2066, seeks

review of a decision of the Court of Appeals for the District of Columbia Circuit reversing a district court judgment which held illegal and invalid the Secretary's penalty assessment procedures under 30 CFR Part 100 on grounds that they failed to conform with the statutory language of Section 109(a)(3) of the Act which requires that penalty assessment orders must be supported by a decision of the Secretary "incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted".

The extensive record in the *National Independent* case presents in its broadest scope the question of whether the Secretary may assess penalties without making and publishing factual findings. The record there relates to some 10,000 penalty assessment orders involving more than $20 million issued under the Part 100 assessment procedures from the time of their inception in January 1971 until the Secretary suspended and replaced such procedures in April 1973. The *National Independent* case thus presents the broad question as to the enforceability of several thousand assessment orders issued during the period the revoked procedures were in effect.[1]

[1] Respondents are amazed by the assertion at page 18 of the Petition that "the penalty for most of these violations is small – about the size of a traffic ticket". The penalties assessed against respondents here totalled $7895 for just three cases. The record in the *National Independent* case contains tabulations of hundreds of penalty assessment orders in amounts in excess of $5000 during a period covering only six months. The average penalty assessment order issued under the Part 100 procedures was in excess of $2000 – hardly in the category of traffic tickets.

In contrast to the *National Independent* case the factual record here is extremely limited, consisting only of assessment orders for which the Secretary sought enforcement in three cases filed in the U.S. District Court for the Western District of Pennsylvania. The district court in each of the three cases granted summary judgment for respondents on grounds that the assessment orders were unsupported by any decision or findings of fact by the Secretary. For example, in the first of the three cases, *Morton v. G.M.W. Coal Company*, the court stated:

> "...it is clear that the proposed orders of assessment as well as the final orders based thereon do not set forth 'findings of fact' concerning either the occurrence of a violation or the amount of the penalty assessed. The express language of the Act makes it equally clear that an order of assessment must be supported by a 'decision incorporating his (the Secretary's) findings of fact therein, that a violation did occur and the amount of the penalty which is warranted". (See text of the decision reproduced as Appendix D to the Petition).

The jurisdiction of the district courts to enforce penalty assessment orders is derived from section 109(a)(4) of the Act, which specifies that upon filing a petition for enforcement "the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued", and that:

> "The Court shall have jurisdiction to enter a judgement enforcing or setting aside in whole or in part the *order and decision of the Secretary* . . ." 30 USC Section 819(a)(4); emphasis added.

On the state of the record before it the district court below had no choice but to grant summary judgment

for respondents. Since the Court did not have before it in any of the three cases the requisite "order and decision of the Secretary" it could not, under section 109(a)(4), grant the Secretary's petition for enforcement. By reason of his failure to issue a decision incorporating his findings of fact respecting the occurrence of the alleged violations, and the amount of the penalty warranted for each such violation, the Secretary made it impossible for any court to review and determine the propriety of his assessment orders. The absence of an "order and decision" upon which the Court could act also placed his assessment orders beyond the jurisdiction of the district courts under Section 109(a)(4).

In summary, there is no substantive record here to permit this Court to decide broad legal questions regarding enforceability of the large mass of penalty assessment orders issued under the Part 100 procedures. The validity of such penalty orders turns upon the question of whether the Part 100 regulations were valid, and the ample record presented in the *National Independent* case provides the most suitable base for determination of that question.

Apart from the lack of substantive merit in the Petition here, respondents are constrained to note the extent to which the Petition incorporates unsubstantiated hearsay material such as the statement contained in footnote 9 on page 9, various figures cited on pages 15 and 16, "random sampling" of assessment actions referred to in footnote 24 beginning on page 18, and gratuitous comments regarding the sufficiency of the "new" Part 100 procedures published in July 1974. Since this case involves assessments under the

"old" Part 100 procedures we can see no materiality in the discussion of revised procedures adopted at a later point in time.

Finally, petitioners contention that reassessment of old cases would be "a staggering task" provides no justification for the Secretary's circumvention of the statutory provisions governing his penalty assessment functions. If the Secretary regards the statutory procedure too cumbersome to deal with a large number of assessment cases his proper recourse should be to seek amendment of the statute by Congress, rather than ask the courts to sanction his disregard of the statutory language as it now stands.

Respectfully submitted,

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January 1975